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A BLOW AT THE FREEDOM OF THE PRESS.

BY HANNIS TAYLOR.

IT IS rather a startling statement, and yet one which is deliberately made without any qualification whatever, that under the Constitution of the United States, as lately construed by the Supreme Court, Congress possesses the same censorial and despotic power over *the intellectual contents* of all communications, written or printed, open or under seal, which pass through the mail, that was exercised at the end of the middle ages under those European systems which denied the right of all literature to circulate, save "such as should be first seen and allowed."

In the judgment lately rendered in the freedom-of-the-press cases,* the first in which the rights of the press under the federal constitution were ever presented for adjudication, it was held that the limitation in the First Amendment, which expressly provides that "Congress shall make no law . . . abridging the freedom of speech or of the press," in nowise restrains the autocratic power of that body to look into the contents of all documents passing through the mail, and to exclude all, when *the ideas* which they seek to disseminate are "condemned by its judgment." Or, as the Court itself has still more pointedly expressed it, the federal government has the right "to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals;" it may decline "itself to become an agent in the circulation of printed matter which it regards as injurious to the people." Congress may refuse "to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls."

There can be neither cavil nor question as to the result which has been reached; the declaration has been clearly and curtly made that Congress possesses the autocratic power to exclude from the mail every document, public or private, political, religious or

**In re Rapier*, *In re Dupré*, 143 U. S., 110-135.

social, whenever the ideas or principles which it seeks to disseminate are "condemned by its judgment," as injurious to the people. The only possible restriction which rests upon this new-born despotism is embodied in the proviso that Congress does not possess "the power to prevent the transportation in other ways, *as merchandise*, of matter which it excludes from the mails." In other words, the Court holds that that clause of the constitution which expressly prohibits Congress, by name, from passing any law abridging the freedom of speech or of the press, guarantees to the people no right whatever to disseminate their ideas through the only agency which Congress controls, provided that body does not attempt to interfere with their transportation, as merchandise, over routes which it does not control. The circumstances under which this judge-made proviso—a proviso which has prostrated at a blow the bulwark which the fathers fancied they had built up between Congressional tyranny and freedom of opinion—came into existence, constitute one of the most remarkable episodes in our judicial history.

With the advent of the art of printing the press was everywhere in Europe subjected to a rigorous censorship, the essence of which was the right of the church or state to say beforehand that no book or paper should circulate when the preliminary license was withheld by the functionary or council possessing the power to grant or withhold the *imprimatur*. During the reign of Elizabeth the general regulation of the rights of printing and publishing was actively assumed in England by the supreme censorial authority of the age, the Star Chamber, and when in the reign of James I. the first newspaper made its appearance the novel and obnoxious form of public discussion which it introduced was promptly silenced by its imperious mandate. When, upon the fall of the Star Chamber, the censorship passed for a time from the Crown to the Parliament, the restraints previously imposed upon freedom of discussion suffered no relaxation.

After the Restoration the entire control of printing and publishing was resumed by the Crown and placed in the hands of its agents, under the licensing act of 1662, which substantially embodied the iniquitous system the Star Chamber had administered. That act, originally limited to two years, was renewed, with a short intermission, down to 1695, when the whole censorial system perished forever in England through the refusal of the Com-

mons in that year to reënact the statute by which it was upheld. The practical result of this silent revolution was to forever withdraw from the Crown and the Parliament that despotic censorial power which they had so long exercised over opinion, through the irresponsible agency of political functionaries. After the censorship was thus overthrown by the failure of the licensing act in 1695, the only restraints which remained upon the freedom of opinion were the judicial restraints embodied in "the law of the land," which were only enforceable through the judgments of courts based upon the verdicts of juries. And yet, even after that point had been reached, it was found that the battle had been but half won, for the reason that, under "the law of the land," as construed by the judges, with Mansfield at their head, it was held that the main question—the character of the utterance itself—was a question for the judges alone; while only the subordinate and not often disputed fact of publication could be submitted by the accused to a jury.

Such was the doctrine persistently enforced in Westminster Hall in that famous series of prosecutions for criminal libel which, beginning with the prosecution of Wilkes in 1763, continued until after the adoption of the first ten amendments to the Constitution of the United States. In these, as in all other cases of criminal libel, "the only material issue for the jury to try, was whether the paper was libellous or not; and this was emphatically declared to be entirely beyond their jurisdiction. *Trial by jury was the sole security for the freedom of the press*; and it was found to have no place in the law of England."* Against this monstrous usurpation of judicial power it was that Erskine thundered until his voice so stirred the English people that, by the declaratory statute known as Mr. Fox's Libel Act, introduced in 1791, and passed in 1792, the high court of parliament itself adjudged that the constitutional law of England had ever been, and ever should be, as Erskine had so long and so brilliantly contended. The heart of that contention was that the essence of that freedom which Englishmen call "the freedom of discussion," and which Americans call "the freedom of speech and of the press," is the right of every one to say or print whatever he pleases subject only to the censorial power which resides in juries alone. Or, as a great authority has lately expressed it, "Freedom of discussion

* May's "Const. Hist.," vol. ii., 114.

is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."* When—a century after both the Crown and the Parliament had abdicated forever all right to interfere with the freedom of discussion—the principle was thus finally settled that the legality or illegality, the *morality or immorality*, of the contents of any book, letter or newspaper circulated in England could only be considered and passed upon by a jury fresh from the ranks of the people and imbued with their sentiments, the keystone was put into the arch upon which the whole fabric of Anglican freedom of opinion, on both sides of the Atlantic, has been superimposed.

It so happened that while Erskine was waging his majestic warfare for the establishment of that liberty, which Lord John Russell has called "the guardian and guide of all other liberties," the federal convention of 1787 met for the performance of its duties. It is not, therefore, strange that the din of the conflict which was then rife in the streets of London and in Westminster Hall should have impressed the American people with the necessity of carefully guarding the freedom of speech and of the press alike against judicial tyranny and Congressional interference. Although the earnest effort made in the convention to insert a special limitation to that effect in the original constitution failed, simply because it was deemed unnecessary, the matter was not lost sight of. The instant that it was settled that the new constitution was to be supplemented by amendments which were to embody a bill of rights, five States sent up to the first Congress, in as many different forms, the suggestion out of which was carved that clause of the First Amendment which expressly forbids Congress, by name, from making any law "abridging the freedom of speech or of the press." Thus was this vital provision set in the forefront of our National Bill of Rights as the corner-stone upon which our free constitution was to rest for all time.

As the formulated outcome of a then recent revolution, the plain, obvious, and settled meaning of the term, "freedom of speech and of the press," was at the time of the adoption of the First Amendment known to all men, even to the judges. It was perfectly well understood by everybody that the clause in question was intended to deny to Congress the power to erect in this

* Dicey's "The Law of the Constitution," 231.

country that kind of a *political* censorship which had passed away from the Crown and the Parliament a century before the American Revolution began ; that it was intended to deny to the judges the right to establish that kind of a *judicial* censorship which Mansfield had struggled in vain to uphold ; that it was intended to guarantee to every American citizen, so far as the federal government was concerned, the right to speak or write what he pleased, subject only to the censorial power which resides in juries alone. So perfectly was this principle understood that when in 1798 the Congress, through the infamous act known as the Sedition Act, struck its first blow at the freedom of the American press, it was careful to provide that all accusations which should be made under it must be tried by juries armed with the power not only to pass upon the fact of publication, but upon the vital question involved in the subject matter of the publication itself.

It had not at that time entered into the brain of any American jurist, statesman, or partisan that Congress might, in the very teeth of the First Amendment, assume censorial powers, and withdraw from juries the right to consider the supreme question whether or no the subject matter of a publication is moral or immoral, legal or illegal. And at a later day, when it became necessary for Congress to prohibit the circulation through the mail of immoral literature, the same constitutional guarantee was kept steadily in view. There can be no question that under the original grant of authority to Congress "to establish post-offices and post-roads," plenary power was given to regulate the entire postal system of the country, subject only to the subsequent limitation that in the exercise of such control it shall make no law abridging the freedom of speech or of the press,—the plain and simple meaning of which is that no one shall be punished on account of the contents of any document sent through the mail until a jury has first determined, under "the law of the land," that the same is either immoral or illegal. Frankly recognizing this historic limitation upon its powers, Congress, in the perfectly constitutional statute forbidding the circulation through the mail of immoral and obscene literature, expressly provided that in all such cases the fact whether the contents of any given publication is immoral or obscene can only be considered and passed upon by juries alone. In the leading case of *U. S. vs. Bennett*, 16 Blatch., 343, the judge in submitting the only ques-

tion at issue to the jury said : "The only question, therefore, which you are called upon to decide is whether or not the book is obscene, lewd or lascivious, or of an indecent character. Now you have had this book in your hands, and the district attorney has marked certain passages as the matter you are to determine upon." Here the whole matter is reduced to its narrowest possible compass. The act against the circulation of immoral literature, which was not drawn in a paroxysm of excitement, exhausts the entire constitutional authority over the intellectual contents of documents passing through the mails that Congress can exercise. By virtue of the law of criminal libel, which is part and parcel of the First Amendment, Congress can punish every offender who sends an immoral or obscene publication through the mail, leaving it to a jury alone, under the constitutional guarantee, to determine in each case what publications are immoral. When that act was passed, it never occurred to Congress that it might, by flatly ignoring the First Amendment, re-create the mediæval censorship and establish an "*Index Expurgatorius*," for all such publications as its arbitrary judgment might deem obscene or immoral.

If the decision lately made by the Supreme Court,—to the effect that all communications may be arbitrarily excluded from the mail, when the ideas which they seek to disseminate are "deemed injurious by Congress to the public morals,"—be a sound one, then at its next session Congress may amend the act against immoral literature by incorporating into it a black list of all the books and papers which have passed under the ban of its censorial judgment. Of course, in such a list Congress can, if it sees fit, enter the New Testament alongside of the works of Voltaire ; and when the Christian shall cry out against the sacrilege, and the heathen shall rage against the injustice, the short answer can be given that the Supreme Court has said that Congress, while in the exercise of its power to regulate the intellectual contents of the mail, is as supreme and infallible within the contested domain of morals as the papacy itself,—that its autocratic discretion is, within that domain, absolutely unrestrained by any limitation whatever. Thus, through an *ex cathedra* revelation from the Supreme Court, made at the close of the nineteenth century, and in a land which poses in the garb of "Liberty enlightening the world," the dogma of the infallible State has been set up as the counterpart

of the dogma of the infallible Church. There can hardly be a doubt that neither Congress nor the Supreme Court would have permitted themselves to be dragged into this grotesque position, so dangerous to the future liberty of the country, had not both bodies been seduced by the fatal argument that the vastness of a temporary evil which they were called upon to suppress, and which they alone could suppress, justified the sacrifice.

Never until the passage of the act known as the anti-lottery law, approved Sept. 19, 1890, did Congress ever venture to assert that it possessed the power to exclude newspapers and other publications from the mail by reason of their contents. That act, although designed to destroy the Louisiana State Lottery Company, operates directly upon the publishers of all American newspapers who claim the right to print what they please, subject to the limitations which the First Amendment embodies.

Two publishers who resolved to resist the power of Congress to exclude their newspapers from the mail, because they had seen fit to print in their columns matter concerning a subject which that body had proscribed, in due time presented the constitutional validity of the act for adjudication in the Supreme Court of the United States. In the cases there presented the contention was clearly made that the power originally vested in Congress to regulate the postal system of the country was afterwards expressly fettered and limited by that clause of the First Amendment which forbids Congress, by name, to make, in the exercise of its regulating power, any law "abridging the freedom of speech or of the press;" that that formula is an historic one whose settled meaning, in both the English and American precedents, is that the *legislative* department of government can never consider or pass upon the morality or immorality, the legality or illegality, of anything that may be said or written by citizen or subject; that the character of all utterances, whether written or printed, presents purely a judicial question which belongs to juries alone; that the attempt made by Congress to adjudicate that all publications or other utterances touching the business of a lottery are *per se* immoral, is a gross usurpation of judicial power.

As it was the first time in the history of the Republic that the publisher of an American newspaper had ever sought protection at the hands of that Court against what he claimed was a gross attempt to violate his rights upon the part of the American Con-

gress, it was certainly to have been expected that an exposition would have been made worthy of the subject and of the occasion. But the Court deemed otherwise. In a brief statement from the Chief Justice the announcement was made that the Court held the act constitutional because the question at issue had been adjudicated adversely in the case of *ex parte* Jackson (96, U. S. 727), a case which arose twelve years before the rights of the press in the mail were ever assailed, a case in which no one connected with the press appeared, and in which its rights were neither involved nor represented. The statement thus made does not pretend to be an independent adjudication; it simply purports to be a reiteration of what had been said in *ex parte* Jackson.

The leading purpose of this review will be to demonstrate (1) that no *adjudication* as to the freedom of the press was made, or could possibly have been made, in *ex parte* Jackson, that what was there said on that subject was the veriest of all *dictums*; (2) that in the *dictum* which then first saw the light appeared the judge-made proviso which has practically eliminated the freedom-of-speech-and-of-the-press clause of the Constitution by excluding it from the only field in which it was ever intended to operate; (3) that the only reason ever given for the creation of that judge-made proviso rests upon a mistake as to an historical fact.

In *ex parte* Jackson the only party before the Court was a person who had deposited in the mail "a circular letter concerning a lottery offering prizes," in violation of a statute forbidding the mailing of such "a letter or circular." At that time there was no law in existence which pretended to interfere with the circulation of newspapers through the mail in any manner. The right and the only right involved in the Jackson case was the "freedom of speech," a right kindred to but not identical with the "freedom of the press." The constitution clearly distinguishes between them, and provides for their protection in separate phrases. The only adjudication which possibly could have been made in the Jackson case was as to the "freedom of speech," and the inexplicable fact is that counsel utterly failed to present, or the Court to suggest, the one clear and historic ground upon which that right has ever depended. So long had it remained unassailed that its very nature and history had been forgotten. The short answer to the whole matter was that Congress could not exclude the circular in question from the mail, by virtue

of its contents, for the reason that the sender had the right under the First Amendment to have the legality or illegality of its contents passed upon by a jury of his peers before any penalty whatever could be imposed upon him. And yet, without ever considering the one simple question really involved in the case, the Court held that the political department of the government could take the jury's place and make the adjudication. Not content, however, with thus trampling upon the vital right actually before it, the Court felt called upon to go outside of the record in order to define what would be the rights of newspapers in the mail whenever a future statute should be passed forbidding their circulation through that channel. While thus engaged in the domain of purely abstract speculation in regard to the rights of the press, which were not presented for adjudication until thirteen years thereafter, the Court encountered an obstacle which seemed absolutely to bar its way to the conclusion which it was necessary for it to reach in order to make its policy for the suppression of lotteries complete and "thorough."

Only once before the Jackson case arose had the question of the power of Congress to exclude publications from the mail, by reason of the ideas which they sought to disseminate, been discussed by the jurists and statesmen of the country, and that was in the memorable debate which took place in the Senate in 1836 upon the report presented by "the select committee to which was referred that portion of the President's message which relates to the attempts to circulate through the mails inflammatory appeals to excite the slaves to insurrection." In the midst of great excitement President Jackson appealed to Congress to pass a law to exclude such inflammatory appeals from the mail, and Mr. Calhoun was appointed chairman of a select committee of the Senate. After an exhaustive examination of the whole subject, and with every motive to reach an opposite conclusion, Mr. Calhoun reported in the most emphatic terms that the First Amendment absolutely prohibited Congress from excluding any communication from the mail by reason of its contents. As a way out of the difficulty, however, he suggested that Congress could pass a law authorizing any deputy postmaster in any State or Territory to refuse to deliver any newspaper or other publication touching the subject of slavery where, by the local law, their circulation was prohibited. In reply to that untenable position, which attempted to

find in the States a power Congress had not, Mr. Webster delivered the clearest and most exhaustive exposition ever made of the freedom-of-the-press clause of the constitution considered as a direct limitation upon Congressional power. With him there was no fumbling, no lack of historical knowledge. Diving at the central question, he at once perceived that the limitation in the First Amendment was intended to be applied to powers which Congress really possessed and not to powers that it did not possess; that its plain purpose was to guarantee to newspapers the right to circulate *through the mails*, the only means of circulation which Congress could control, and not *outside of the mails*, by means of transportation which Congress could not control. "What was the liberty of the press?" he asked. "It was the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; *and was not the circulation of papers through the mails an ordinary mode of publication?*" Guided by his unerring legal instinct he then declared that any attempt by Congress to exclude publications from the mail, by reason of their contents, would be a gross usurpation of judicial power. He said it would be admitted that if a newspaper came directed to him he had a property in it; and how could any man then take that property and burn it without *due form of law*? And he did not know how this newspaper could be pronounced "*an unlawful publication* and having no property in it *without a legal trial*."*

Mr. Clay, who took part in the debate, concurred in the result of these views, and the Senate refused to tamper with the matter at all. Such was the character of the lion which stood in the path of the Supreme Court when it undertook to create the grim and novel doctrine which first saw the light in the *dictum* announced in *ex parte* Jackson. To sweep away at a brush a conclusion in which Webster, Clay, and Calhoun had concurred, through a process of argument at once invincible and historic, was a serious undertaking, and yet the Court was undaunted. At the critical moment necessity became the mother of discovery. The Court suddenly found out that the superficial thinkers who had taken part in the debate of 1836 had reached an erroneous conclusion, because they had fallen into a fatal error as to a vital branch of the subject. That discovery is thus expressed :

*For the best report of Mr. Webster's speech, see Benton's "Thirty-Years View," Vol. I., p. 586.

"Great reliance is placed by the petitioner upon these views, coming as they did, in many instances, from men alike distinguished as jurists and statesmen. *But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail;* and of course it would follow that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails."

Thus it was that this judge-made proviso came into existence which declares that the First Amendment guarantees to the citizen no right whatever to send his communications *through the mail*, provided that Congress, after it has excluded them from the only practicable channel of circulation, does not "prevent (their) transportation in other ways, *as merchandise.*" For the making of this judicial revolution, for the overturning of the perfectly sound conclusion reached in the debate of 1836, only one reason has ever been given, and that is that the "jurists and statesmen" who took part in that debate utterly missed the mark through the false "assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail."

What was said and written during the debate of 1836 is a matter of record; and, after a very careful examination of that record, the assertion is made that the only person who really had anything to say as to the power of Congress to control the transportation of documents "over postal routes in any other way than by mail" was Mr. Calhoun; and, as his report shows, he emphatically declared that Congress could *not* exercise any control over their transportation in that manner. In his anxiety to emphasize the want of power in Congress to abridge the freedom of the press at all, Mr. Calhoun said, by way of antithesis, that if it were once conceded that Congress could exclude documents from the mail, by reason of their contents, some extremist would claim next that Congress could declare all roads post roads, and then extend the exclusion to their transportation even in that manner.

Thus, out of Mr. Calhoun's solemn and convincing argument that it would be *monstrous* for any one to contend that Congress could hinder the transportation of documents "over postal routes in any other way than by mail," has arisen the charge that he

and all others who took part in the debate of 1836 were befogged by a diametrically opposite "assumption."* When the fragment from Mr. Calhoun's report which the Court has quoted is taken with the context, it is obvious that the Court has read an affirmative where a negative is written. The misapprehension is clearly the result of a hasty reading of a long document.

From what has now been said it clearly appears that the judgment rendered in the freedom-of-the-press cases rests alone upon the *dictum* announced in *ex parte* Jackson; and that the only reason ever given for that *dictum* rests upon nothing more substantial than a palpable mistake as to an historical fact. And yet the sad truth remains that by the phantom hand of the "legal fiction" to which that *dictum* has given birth the beacon light of free thought, which the fathers set upon the housetop of the constitution, has been for a time extinguished. Sir Henry Maine, in his great work on "Ancient Law," has told us that the most subtle and irresistible device ever employed by judges to change the effect of positive laws and constitutions, without changing their outward form, is what is known to lawyers as a "legal fiction." "The *fact* is that the law has been wholly changed, the *fiction* is that it remains what it always was."

The *fiction* set up in this matter is that the right of a citizen to have his communications transported, as merchandise, *outside of the mail*, over impracticable routes which Congress does not control, fully satisfies the terms of the First Amendment.

The *fact* is that the power now recognized in Congress to arbitrarily deprive the citizen, *without a legal trial*, of the right to send his communications *through the mail*, the one agency which it does control, takes away the only substantial right which the First Amendment was ever intended to guarantee to him.

Such a result, so at variance with all reason and all precedent, cannot of course be permanent. This new-born heresy—created to meet a special emergency—will be utterly repudiated by the American people the moment that the despotic and irresponsible power over opinion, with which the fiat of the Supreme Court has armed Congress, is applied, as it surely will be, to some subject which will arouse and quicken the public conscience.

HANNIS TAYLOR.

* The report may be found in full in Niles' "Register," vol. 49, 408-411.